United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

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To be argued by
ROBERT S. HAMMER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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MICHAEL WILLIAMS, :

Plaintiff-Appellee, :

-against- :

BENJAMIN WARD, PAUL REGAN, :

Defendants-Appellants. :

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BRIEF FOR APPELLANTS

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BRIEF FOR APPELLANTS

Questions Presented

1. Did the District Court err in failing to treat plaintiff's complaint as a petition for habeas corpus?

2. Did the District Court err in failing to dismiss the complaint on the ground of res judicata?

3. Did the District Court misconstrue this Court's ruling in Cardaropoli v. Norton, 523 F. 2d 990,

by ordering that plaintiff be furnished with privileged and confidential material from his prison file regarding his mental state and by ordering that plaintiff be given a new hearing before the parole board?

Statement of the Case

This is an appeal from a judgment of the District Court for the Southern District of New York (Knapp, J.) entered August 6, 1976, granting summary judgment to plaintiff directing that he be furnished with copies of all unconfidential material in his institutional file; a "fair summary" of confidential material, which "shall not reveal sources but shall fairly state any conclusions adverse to the plaintiff which may be drown therefrom" and that the parole board grant plaintiff a new release hearing (76 a).*

By order of this Court dated September 14, 1976, the judgment has been stayed pending appeal.

* Numbers in parentheses followed by "a" refer to pages of the Appendix.

In 1964, plaintiff pleaded guilty to two murders in Supreme Court, Kings County and was sentenced to life imprisonment (15x-a). Pursuant to N.Y.L. 1975, Ch. 343 plaintiffs minimum sentence was reduced to 8 years 4 months to enable him to meet the parole board.

In a complaint dated June 4, 1975, alleging a claim under 42 USC § 1983, 28 USC § 1343, plaintiff sought to expunge from his prison and parole files material characterizing him as mentally disturbed and to require that he be given a right of prior inspection and reply before any other material from "judges, prosecutors and other outside sources" were added to his files (15 a).

The complaint, apparently prompted by a forthcoming appearance before the parole board, future applications for temporary release as well as a prior unsuccessful application for executive clemency, focused on correspondence from the Probation Department and the Judge who sentenced him which characterized him as having a history of mental disturbance. Copies of these letters which had come how

been obtained by plaintiff were attached to the complaint (15xya). Plaintiff alleged that his characterization as "mentally disturbed" was false and that the continued presence of such material in his file, having been placed there without his having had an opportunity to refute it, constituted a denial of liberty without due process of law (12-13a).

Shortly after the complaint was ordered filed plaintiff appeared before the parole board. Following a hearing September 11, 1975 (34 a), plaintiff was advised that he had been denied parole because of:

> "The violent and vicious nature of the crimes.
> Institutional reports indicate that you may benefit from the treatment which is available to you at this institution and in which you have not participated and which we feel is necessary for your rehabilitation.
> There is no indication that you have utilized available programs to prepare yourself for parole release as this time." (39 a)

After a motion to dismiss had been denied, (21 a), plaintiff moved for summary judgment not only requesting the deletion of material from his file, but a new parole hearing as well. It may be noted that plaintiff relied upon this Court's decision in Cardaropoli, supra and requested that his "special offender classification"* (sic) be removed (22 a).

Defendants opposed the motion on the ground that, alternatively, the complaint actually sought habeas corpus so that plaintiff was required to exhaust state remedies; and that he received a fair parole hearing and that the reasons furnished to him were sufficient to comply with the rulings of this Court (32 a).

The District Court, in a memorandum dated April 7, 1976, accepting the theory of plaintiff's action directed the submission of additional papers by defendants--a Rule 9 (g) statement, and any affidavits they wished to submit,

* A term used on the federal prison system to denote professional criminals linked with "organized crime", among other custodial problems, see 523 F.2d 990, 993

a memorandum of law relating to the Cardaropoli claim and further directed the submission of all material in plaintiff's institutional files relating to his "alleged mental instability" (49-54).

As a result of a chain of events set forth in counsel's affidavit sworn to July 8, 1976 (57a), this information was not supplied within the twenty days set forth in the District Court's earlier memorandum decision; a default was taken on the motion (53 a). Although defendant's subsequent motion to vacate the default was denied, the denial was based solely upon the merits of the case which were fully considered; the Court having accepted the reasons given for the default (72 a). The material requested by the Court in its April 7, 1976 memorandum was supplied at that time.

In addition to the material requested by the Court,* it was urged by counsel that the case should be dismissed upon the ground of res judicata, since the cases of Williams v. Caldwell, 75 Civ 48 (E.D.N.Y.) brought by

* The material submitted for in camera inspection consisted of the pre-sentence probation report, pre-parole hearing data sheet, psychiatric progress bases and the correspondence from plaintiff to Judge Cone and the letters attached to the complaint as exhibits. The will be made available to this Court for in camera inspection upon request.

plaintiff raising similar issues had been treated as an application for habeas corpus and dismissed for failure to exhaust state remedies as well as on the merits (59 a). However, the District Court rejected this as well as the other defenses interposed by the defendants (70-71a). The Court held that under the rationale of Cardaropoli, supra, and Velger v. Cawley, 525 F 2d 334 (2d Cir. 1970) cert. gr. 44 U.S.L.W. 3745, plaintiff was entitled, as a matter of due process, to rebut material which had an adverse effect upon his chances for parole and work-release (71 a), and that any need for confidentially could be protected by a process of summarizing the material without giving the sources (76 a).

POINT I

THE COMPLAINT SHOULD HAVE BEEN TREATED AS A PETITION FOR HABEAS CORPUS. THE DISTRICT COURT ERRED IN FAILING TO DISMISS ON THIS GROUND; BOTH IN THE FIRST INSTANCE AND AS A MATTER OF RES JUDICATA

Plaintiff's object in this action was to gain his release from prison through a new parole hearing "untainted" by material placed in his institutional and parole files allegedly in violation of his constitutional rights. Thus this action should have been treated as one for habeas corpus, Preiser v. Rodriguez, 411 U.S. 475, 385-386, 501 (1973); Billiteri v. United States, ___F.2d___, NYLJ 9/15/76, p. 1, col. 6, p. 17 col. 1 (2d Cir. 1976), and plaintiff required to exhaust his state remedies, 28 U.S.C. § 2254(b), U. S. ex rel. Johnson v. Vincent, 507 F.2d 1309, 1311-1312 (2d Cir. 1974) cert. den. 420 U.S. 994 (1975); U. S. ex rel. Smith v. Montayne, 505 F.2d 1355, 1357 (2d Cir. 1974)

This was precisely the disposition in another case brought by plaintiff, Williams v. Caldwell, 75 C 1948 (E.D. N.Y. 1976) Judd, D.J. (62a), wherein plaintiff sought a new

parole hearing on other grounds. Judge Judd held that plaintiff was required to exhaust his state remedies. Since this precise issue had been previously litigated in another court, the complaint should have been dismissed for this reason alone, Thistlethwaite v. City of New York, 497 F.2d 339, 341 (2d Cir. 1974)

POINT II

THE DISTRICT COURT IMPROPERLY RELIED UPON THE CARDAROPOLI CASE AS A BASIS FOR ORDERING THE DISCLOSURE OF CONFIDENTIAL MATERIAL IN PLAINTIFF'S FILES. ITS DISCLOSURE IS BARRED BY THE APPLICABLE DECISIONS OF THIS COURT

The fundamental error of the District Court in applying Cardaropoli v. Norton, supra, to the case at bar is the erroneous assumption that a candidate for parole enjoys a right which is protected by due process of law (71a), cf Arnett v. Kennedy, 416 U.S. 134 (1974).

Although the precise issue of the right to due process at a pre-release parole hearing is presently before the Supreme Court in Scott v. Kentucky Parole Board, # 74-6438, cert. granted December 15, 1975, see Meachum v. Fano, ___U.S.___, 44 U.S.L.W. 5053, 5058, f.n. 8 (1976), the majority of the

Circuits that have dealt with the question have ruled that such a right does not exist, Scarpa v. United States Board of Parole, 477 F.2d 278 (5th Cir.) (en banc), vacated as moot, 414 U.S. 809; Farrier v. United States Board of Parole, 484 F.2d 948 (7th Cir. 1973); Mosley v. Ashby, 459 F.2d 477 (3d Cir. 1972); Madden v. New Jersey State Parole Board, 438 F.2d 1189 (3rd Cir. 1971); contra, Childs v. United States Board of Parole, 511 F.2d 1270 (D.C. Cir. 1974).

Neither has such a right been recognized in the closely related classification and transfer cases, Meachum v. Fano, supra; Montayne v. Haymes, ___U.S.___, 44 U.S.L.W. 5051, 5052 (1976). The Haymes case is highly significant to the present inquiry, since it overruled Newkirk v. Butler, 499 F.2d 1214 (2d Cir. 1974), vacated as moot, 422 U.S. 395 (1975), relied upon by the District Court in Catalano v. United States, 383 F.Supp. 346, 352 (D.Conn. 1974), which, in turn, was cited with approval by this Court in Cardaropoli, 523 F.2d at 996. Thus Cardaropoli itself cannot be considered strong authority.

B.

Furthermore, this Court has already restricted a prisoner's access to institutional and parole files:

A state prisoner who is a candidate for parole is not entitled to dicovery of his institutional and parole files, Billiteri v. United States, supra, NYLJ 9/15/76, at p. 16 col 4, Haymes v. Regan, 525 F.2d 540, 542 (2d Cir. 1975).

The State Parole Board is under a statutory mandate to release a prisoner only if it believes that he will conduct himself as a law-abiding citizen, N.Y. Correction Law § 213.

Among the items considered by the Board is the presentencing probation report, which this Court has recently held that the Board entitled to consider, Billiteri v. United States, supra, NYLJ 9/15/76, at p. 16 col 4. This report is confidential as a matter of state law, N.Y. Crim. Pro. L § 390.50, a privilege that the federal courts are bound to respect, Fed. R. Ev., Rule 501.

The Board must also determine under its § 213 mandate whether a prisoner's mental health will permit him to function in the community. In 1960, after one horrible incident involving a paroled murderer who, almost immediately after his release proceeded to kill again, the Governor issued an executive order requiring special psychiatric screening of persons convicted of homicides and sex crimes, 9 NYCRR § 1.5. This concern is also reflected in Correction Law § 214, which requires submission of all institutional psychiatric reports to the Board.

In requiring disclosure of psychiatric reports from various institutions over a period of years, the District Court went far beyond this Court's ruling in Cardaropoli v. Norton, supra. That case involved alleged links of an inmate to "organized crime", information of an entirely different quality than a psychiatrist's impressions. In applying cardaripoli to the case at bar, the District Court missed the entire thrust of that case as well as ignored this Court's general prohibition against discovery of parole files, see Haymes v. Regan, supra. This is underscored by the fact plaintiff's claims that the information in his file is erroneous (13-14a) were completely conclusory and without

sufficient factual basis to state a claim under the Civil rights laws, Powell v. Workmen's Compensation Board, 327 F 2d 1131 (2d Cir. 1964); Powell v. Jarvis, 460 F. 2d 551 (2d Cir. 1972).

Finally, the form of disclosure ordered by the District Court is completely unrealistic. Of the material in plaintiff's files characterizing him as mentally disturbed not already within his knowledge 115xya), that portion of the probation report involving mental health and the psychiatric progress notes (as well as the pre-parole hearing report which summarizes them) could never be summarized without concealing the obvious fact that the information comes from the prison psychiatrists or the other doctors who examined and treated him in other institutions. For this reason as well, this District Court's erroneous decision should be reversed.

CONCLUSION

THE JUDGMENT APPEALED FROM
SHOULD BE REVERSED AND THE
COMPLAINT DISMISSED

Dated: New York, New York
October 5, 1976

Respectfully submitted,

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